

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JIMMIE STEPHENS,

No. 2:24-cv-1713 CSK P

Plaintiff,

v.

M. FELDER,

Defendant.

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

For the reasons stated below, the Court recommends that plaintiff's motion to proceed in forma pauperis be denied pursuant to 28 U.S.C. § 1915(g). It is also recommended that plaintiff be ordered to pay the filing fee in full prior to proceeding any further with this action.

I. THREE STRIKES RULE

The Prison Litigation Reform Act of 1995 ("PLRA") permits a federal court to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit demonstrating that the person is unable to pay such fees. However, 28 U.S.C. § 1915(g) states:

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1 In no event shall a prisoner bring a civil action or appeal a judgment
 2 in a civil action or proceeding under this section if the prisoner has,
 3 on 3 or more prior occasions, while incarcerated or detained in any
 4 facility, brought an action or appeal in a court of the United States
 5 that was dismissed on the grounds that it is frivolous, malicious, or
 6 fails to state a claim upon which relief may be granted, unless the
 7 prisoner is under imminent danger of serious physical injury.

8 Id. “It is well-settled that, in determining a [Section] 1915(g) ‘strike,’ the reviewing court
 9 looks to the dismissing court’s action and the reasons underlying it.” Knapp v. Hogan, 738 F.3d
 10 1106, 1109 (9th Cir. 2013) (brackets added) (citation omitted). “[Section] 1915(g) should be
 11 used to deny a prisoner’s in forma pauperis status only when, after careful evaluation of the
 12 order dismissing an action, and other relevant information, the district court determines that the
 13 action was dismissed because it was frivolous, malicious or failed to state a claim.” Andrews v.
 14 King, 398 F.3d 1113, 1121 (9th Cir. 2006) (brackets added). “[W]hen a district court disposes
 15 of an in forma pauperis complaint ‘on the grounds that [the claim] is frivolous, malicious, or
 16 fails to state a claim upon which relief may be granted,’ such a complaint is ‘dismissed’ for
 17 purposes of § 1915(g) even if the district court styles such dismissal as denial of the prisoner’s
 18 application to file the action without prepayment of the full filing fee.” O’Neal v. Price, 531
 19 F.3d 1146, 1153 (9th Cir. 2008). Dismissal also counts as a strike under § 1915(g) “when (1) a
 20 district court dismisses a complaint on the ground that it fails to state a claim, (2) the court grants
 21 leave to amend, and (3) the plaintiff then fails to file an amended complaint” regardless of
 22 whether the case was dismissed with or without prejudice. Harris v. Mangum, 863 F.3d 1133,
 23 1142-43 (9th Cir. 2017).

24 An inmate who accrues three strikes is precluded from proceeding in forma pauperis
 25 unless he is “under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). To
 26 satisfy the exception, plaintiff must have alleged facts that demonstrate that he was “under
 27 imminent danger of serious physical injury” at the time of filing the complaint. Andrews v.
 28 Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007) (“[I]t is the circumstances at the time of the
 29 filing of the complaint that matters for purposes of the ‘imminent danger’ exception to
 30 § 1915(g.”). “[T]he imminent danger exception to the PLRA three-strikes provision requires a
 31 nexus between the alleged imminent danger and the violations of law alleged in the complaint.”

1 Ray v. Lara, 31 F.4th 692, 695 (9th Cir. 2022).

2 II. PLAINTIFF'S PRIOR STRIKES

3 Court records reveal that on June 20, 2008, in the Southern District of California, plaintiff
4 was declared a three-strikes litigant in Stephen v. Hernandez. Case No. 3:08-cv0750 BEN BLM
5 ("Stephen I") (S.D. Cal. June 20, 2008).¹ In that case, the court determined that the following
6 actions previously filed by plaintiff constituted strikes:

7 --Stephen v. Lacy, Case No. 2:93-cv-5032 UA (C.D. Cal. Aug. 23, 1993) (dismissed for
8 failure to state a claim), aff'd, Case No. 93-56312, 1995 WL 72353 (9th Cir. Feb. 22, 1995);

9 --Stephen v. Zulfacur, Case No. 3:93-cv-1943 R RBB (S.D. Cal. Apr. 19, 1994)
10 (dismissed for failure to state a claim);

11 --Stephen v. Shelar, Case No. 3:06-cv-1054 LAB WMC (S.D. Cal. Aug. 31, 2006)
12 (dismissed for failure to state a claim);

13 --Stephen v. Hernandez, Case No. 3:06-cv-0171 L WMC (S.D. Cal. Oct. 11, 2006)
14 (dismissed for failure to state a claim);

15 --Stephen v. Marshal, Case No. 2:07-cv-5337 UA SH (C.D. Cal. Oct. 4, 2007) (dismissed
16 as frivolous); and

17 --Stephen v. IRS, No. 3:07-cv-2112 LAB BLM (S.D. Cal. Dec. 4, 2007) (dismissed as
18 frivolous).

19 See Stephen I (ECF No. 4 at 2-3).

20 The Court takes judicial notice of the lawsuits set forth above as well as the findings of the
21 court in Stephen I.² Each prior case was dismissed well before the instant action was filed in June
22 2024, and none of the strikes have been overturned. Thus, the Court finds that plaintiff is
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24 ¹ In Stephen I and in the cases listed as strikes, Plaintiff identifies himself as "Jimmie Stephen,"
25 and not "Jimmie Stephens." However, a search of plaintiff's state prison identification number
 indicates that "Jimmie Stephen" and "Jimmie Stephens" are the same individual.

26 ² A court may take judicial notice of court records. See, e.g., Bennett v. Medtronic, Inc., 285
27 F.3d 801, 803 n.2 (9th Cir. 2002) ("[W]e may take notice of proceedings in other courts, both
28 within and without the federal judicial system, if those proceedings have a direct relation to
 matters at issue") (internal quotation omitted).

1 precluded from proceeding in forma pauperis unless he is “under imminent danger of serious
2 physical injury.” 28 U.S.C. § 1915(g).

3 III. IMMINENT DANGER

4 Plaintiff appears to claim that defendant M. Felder, Chief Medical Executive (“CME”) at
5 California State Prison, Solano, is being deliberately indifferent to plaintiff’s serious medical
6 needs in violation of the Eighth Amendment. In his supporting facts, plaintiff alleges that he is
7 “still subjected to risk of harm by Dr. Felder choosing an alternative treatment to the treatment
8 ordered by urologist Dr. Hsieh which Dr. Felder denied on August 20, 2022.” (ECF No. 1 at 7.)
9 It appears plaintiff had radiation treatment for prostate cancer, and he believes he should have
10 been treated for benign prostate hyperplasia (“BPH”) and erectile dysfunction (“ED”) together to
11 avoid risks of clogged blood vessels, Deep Vein Thrombosis (“DVT”), colostomy bags, bladder
12 removal, and resection of the anus and colon. (ECF No. 1 at 3.)

13 The allegations in plaintiff’s complaint demonstrate that he seeks the imminent danger
14 exception to the three-strikes rule on the basis of the facts supporting his claim for relief.
15 Therefore, the nexus requirement is satisfied. See Ray, 31 F.4th at 695.

16 However, plaintiff’s allegations regarding his continuing dispute over his medical care fail
17 to demonstrate he faced an imminent danger of serious physical injury at the time he filed the
18 instant action on June 14, 2024. Plaintiff alleges that because he had radiation treatment for
19 prostate cancer, and on August 20, 2022, defendant denied the treatment recommended by Dr.
20 Hsieh, plaintiff faces additional risks of physical injury. Such allegations are conclusory and
21 speculative and therefore do not support an exception to the three strikes rule. See Andrews, 493
22 F.3d at 1057 n.11.³ This Court’s finding that plaintiff fails to meet the imminent danger
23 exception is further informed by reviewing plaintiff’s two prior complaints filed in this district,
24 both of which contain similar allegations to those raised herein.

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27 ³ Moreover, differences in medical judgment or opinion do not rise to the level of a constitutional
28 violation. Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004) (negligence constituting
medical malpractice is not sufficient to establish an Eighth Amendment violation).

1 Stephens v. Felder, Case No. 2:22-cv-1791 DAD EFB (E.D. Cal.)

2 On October 11, 2022, plaintiff filed a complaint alleging that several doctors
3 recommended sildenafil to manage side effects from the radiation therapy for prostate cancer, but
4 defendants Felder and Gates denied plaintiff the medication because it is a non-formulary drug.
5 Stephens v. Felder, Case No. 2:22-cv-1791 DAD EFB (E.D. Cal.) (ECF No. 1). Plaintiff alleged
6 that without sildenafil he was at risk of poor blood flow and blood clots. Id. In its screening
7 order, the court found that plaintiff alleged imminent danger concerning his need for a medication
8 called sildenafil but failed to allege facts showing each defendant responded to plaintiff's serious
9 medical needs with deliberate indifference. Id. (Dec. 12, 2022 Order at 3). Plaintiff was granted
10 leave to amend.

11 Plaintiff filed an amended complaint renewing his claim that sildenafil was denied. Id.
12 (ECF No. 8). However, the court found plaintiff "failed to include facts that illustrate his
13 conclusory claims that defendant Felder 'willfully, intentionally, denied, delayed' treatment for
14 plaintiff's radiation therapy side effects by denying a prescription for sildenafil," and failed to
15 show any defendant knew plaintiff faced a substantial risk of serious harm if not provided
16 sildenafil. Id. (Mar. 30, 2023 Order at 3). Plaintiff's amended complaint was dismissed with
17 leave to amend. Id.

18 With his second amended complaint, plaintiff provided pertinent medical records and
19 grievance responses. Id. (ECF No. 15). On May 16, 2022, plaintiff was seen by Dr. Hsieh, who
20 noted that plaintiff was diagnosed with prostate cancer in 2019. Id. (ECF No. 15 at 16). Plaintiff
21 completed radiation therapy in May 2020. Id. His last prostate-specific antigen ("PSA") was
22 0.65, and there was "no evidence of disease. He has erectile dysfunction." Id. Plaintiff also
23 complained of hemorrhoids. Id. Dr. Hsieh recommended sildenafil 100 mg for plaintiff's erectile
24 dysfunction. Id. (ECF No. 15 at 17). On September 19, 2022, plaintiff presented to clinic
25 requesting the sildenafil; he was awaiting a colonoscopy given a positive fit test and reported that
26 "he thinks the blood is coming from his hemorrhoids." Id. (ECF No. 15 at 18). During the
27 grievance process, on May 13, 2022, plaintiff was advised that "treatment for erectile dysfunction
28 is not medically necessary per California Code of Regulations, Title 15, Section 3999.200." Id.

1 (ECF No. 15 at 22). As of September 8, 2022, plaintiff was enrolled in the Chronic Care
2 Program, where he received repeat PSA tests and had an active order for terazosin for benign
3 prostate hyperplasia management. Id. (ECF No. 15 at 41).

4 On August 18, 2023, the assigned magistrate judge recommended that the action be
5 dismissed, noting that plaintiff provided letters from both defendants Felder and Gates stating,
6 respectively, “Viagra is not medically necessary . . . at this time,” and “treatment for erectile
7 dysfunction is not medically necessary” under prison regulations, and plaintiff’s primary care
8 provider “did not document a current condition that meets the criteria for non-formulary use of
9 sildenafil.” Id. (ECF No. 17 at 2-3, quoting ECF No. 15 at 23, 31). On January 25, 2024, the
10 district court adopted the findings and recommendations in full. Id. (ECF No. 21). Plaintiff filed
11 an appeal, which was dismissed on May 23, 2024. Id. (ECF No. 26).

12 Stephens v. Bragg, Case No. 2:23-cv-1172 KJM AC (E.D. Cal.)

13 On June 13, 2023, plaintiff filed a complaint alleging deliberate indifference to plaintiff’s
14 serious medical needs and retaliation. Stephens v. Bragg, Case No. 2:23-cv-1172 KJM AC (E.D.
15 Cal.) (ECF No. 1). The assigned magistrate judge found that the past act of retaliation could not
16 support the imminent danger exception, and that plaintiff’s medical care allegations failed to meet
17 his burden under § 1915(g). Id. (June 27, 2023 Findings and Recommendations at 4). Plaintiff
18 claimed that because he had prostate cancer in 2019, the failure to provide certain follow up care
19 is life-threatening. The judge found that “[b]eing a ‘high risk’ patient . . . is not the same thing as
20 facing imminent harm.” Id. Plaintiff alleged his medical treatment was inadequate, that doctors
21 wrongly attributed his bleeding to hemorrhoids or prostatitis when he might be facing death, and
22 appeared to believe he still had cancer, but provided no facts to support such belief. Id. at 4-5.
23 The judge found that plaintiff’s ongoing dispute about his proper medical treatment did not put
24 plaintiff in imminent danger of serious physical injury and recommended that his request to
25 proceed in forma pauperis be denied. Id. at 5. On October 4, 2023, the district court adopted the
26 findings and recommendations in full. Id. (ECF No. 16). Plaintiff filed an appeal, which was
27 dismissed on May 22, 2024. Id. (ECF No. 23).

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Conclusion

While plaintiff continues to dispute the medical treatment provided by defendant Felder, plaintiff fails to demonstrate that his continuing dispute about the appropriate medical treatment following plaintiff's radiation therapy for prostate cancer put plaintiff in imminent danger of serious physical injury at the time he filed this action on June 14, 2024. Rather, plaintiff continues to speculate as to what might happen if he is not provided the medication for his erectile dysfunction. This is insufficient to meet his burden under 28 U.S.C. § 1915(g). Therefore, it is recommended that plaintiff's application to proceed in forma pauperis be denied, and plaintiff must submit the appropriate filing fee in order to proceed with this action.

In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the Court is directed to assign a district judge to this case; and

Further, IT IS RECOMMENDED that:

1. Plaintiff's motion for leave to proceed in forma pauperis (ECF No. 2) be denied; and
2. Plaintiff be ordered to pay the filing fee in full prior to proceeding any further with this action in light of his status as a three-strikes litigant within the meaning of 28 U.S.C. § 1915(g).

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, plaintiff may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: June 24, 2024

Chi Soo Kim
CHI SOO KIM
UNITED STATES MAGISTRATE JUDGE

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